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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	:	
	:	
Limitations on Commercial Time on Television Broadcast Stations	:	MM Docket No. 93-254
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	:	

COMMENTS OF
NATIONAL INFOMERCIAL MARKETING ASSOCIATION

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SUMMARY OF ARGUMENT

There is no justification for reimposition of quantitative time limits on commercial programming to restrict the showing of program-length commercials by broadcast stations. These programs provide vital revenues, estimated at $240 million annually, that help support free, over-the-air broadcasting. The Commission's prior experience with commercial limits demonstrated that they were difficult to monitor and enforce, even in an era when commercials consisted entirely of 30 and 60 second spots. With the evolution of commercial programming in the last decade and the rapid pace of innovation in this area, reimposition of such limits would be nearly impossible as an operational matter.

Further, given the proliferation of video information sources in the last decade and the imminent expansion in video alternatives, there is no policy justification for reimposing such controls. And reestablishing such limits would substantially restrict the innovation in commercial programming that has been one of the significant benefits of the Commission's 1984 decision.

To the contrary, since 1984, the Supreme Court has clarified that commercial speech is entitled to a substantial degree of protection under the First Amendment. E.g., Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989); City of Cincinnati v. Discovery

Network, Inc., 113 S. Ct. 1505 (1993). A program-length commercial, which proposes a commercial transaction between the sponsor and the viewer, qualifies as "core" commercial speech. Under the First Amendment, there is no legitimate justification for drawing regulatory distinctions that would impose a content-based rule that limits the amount of commercial speech that may be broadcast.

Any content-based discrimination against commercial speech must, at a minimum, be "narrowly tailored" to serve a significant government interest, and the Commission would bear the affirmative burden of justifying any such restriction. E.g., Fox, supra, 492 U.S. at 480. The Commission has long had in place a regulatory scheme that is less intrusive and adequately addresses public interest concerns involving broadcast stations -- its license renewal process. The existence of this process would, as a constitutional matter, demonstrate conclusively that a quantitative time limit is not "narrowly tailored" to address public interest concerns. If the broadcast of an excessive amount of commercial programming were found to adversely affect a particular station's ability to serve community needs and interests, that concern may be fully addressed on a case-by-case basis at renewal time.

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COMMENTS OF NATIONAL INFOMERCIAL MARKETING ASSOCIATION

The National Infomercial Marketing Association (NIMA) respectfully submits these comments in response to the Notice of Inquiry concerning whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations. NIMA believes that reestablishing such limits would harm the public interest, by depriving free, over-the-air television of an important source of revenue. Further, no justification has been shown for reimposition of these limits, and such sweeping restrictions on commercial speech would violate the First Amendment.

BACKGROUND

NIMA is a trade association that represents over 350 firms active in the program-length commercial industry. Its mission is to encourage development of a commercial environment in which consumers can make informed choices about purchasing decisions, based upon the detailed information that is available through the industry's form of

programming. NIMA provides a variety of services to its members, including representation before Federal and State entities, including the Commission. It also maintains the NIMA Marketing Guidelines, which assure that viewers are fully informed about the commercial nature and sponsor of program-length commercials.[1]

A program-length commercial is a paid advertisement for a product or service, typically 30 minutes in duration, that incorporates traditional programming elements into its body, in order to better educate, inform and entertain viewers. Major corporations, such as Eastman Kodak, General Motors, American Airlines, Phillips Electronics, Time-Life, and Volkswagen now use infomercials as part of their marketing efforts. The first generation of program-length commercials typically included a direct response component, in which viewers were offered the opportunity to order the sponsor's product by telephone. The industry continues to evolve at a rapid pace, however, and second-generation programs may de-emphasize or eliminate the direct response component.

The infomercial industry has developed in response to the Commission's 1984 Commercialization decision, which expressly removed prior policy restrictions on program-length commercials. Television Deregulation, 98 F.C.C.2d 1076, 1102. The industry has since grown from product sales

[1]In addition, these programs are governed by Section 73.1212 of the Commission's Rules concerning sponsorship identification.

of $10 million in 1984, to over $750 million in 1992, and to an estimated $900 million of sales in 1993 from direct-response programs alone.

Program-length commercials are shown extensively by both broadcast stations and cable channels. These programs provide a valuable second income stream (and in some cases a primary income stream) to support the operations of broadcast stations, especially independent stations. They thereby contribute to the preservation of "free", over-the-air television.

According to a November 1992 survey by BJK&E Media Group, 91% of the 709 stations that responded to a written survey stated that they show infomercials. Of these stations, 25% show these programs in daytime, and 14% have broadcast infomercials in prime time.

Payments to broadcast stations account for roughly 60% (or approximately $240 million) of the $400 million annually that infomercial sponsors spend for program time. Broadcasting & Cable at 24 (Oct. 25, 1993). Initially, independent broadcast stations were the principal recipients of infomercial revenues. Increasingly, however, network affiliates -- including network owned and operated stations -- are seeking infomercial revenues to support their programming.

For example, CBS recently announced that its seven owned and operated stations (which reach 25% of the video

audience) will run advertisements alerting viewers to program-length commercials that are broadcast in the early morning hours. CBS has arranged for VCR Plus codes to be assigned to infomercials for the first time, so that viewers may record these shows for later viewing. CBS also is working to persuade periodicals to include information about the infomercials in their program listings. The Wall Street Journal at B8 (Nov. 15, 1993). This development shows that program-length commercials have now been accepted by viewers and by the largest broadcast stations, and are no longer confined, as they once were, to small stations and independents.

The program-length commercial field has been marked by continuing innovation, as this new form of programming expands and develops. For example, King World, reportedly the largest syndicator of television programming, recently entered into a joint venture with Sears to produce 30-minute long single product advertisements. These programs are intended to spark sales at Sears' 900 retail stores, and will not be as dependent on direct response sales as the first generation of infomercials. The first programs are expected to air in January. Broadcasting & Cable at 53 (Nov. 8, 1993). Similarly, Phillips Electronics has aired in the top 20 markets a 30-minute infomercial for its new interactive video player. Viewers who call the direct response number receive the names of local retailers where

the product can be purchased. Broadcasting & Cable at 20 (Oct. 25, 1993).

DISCUSSION

NIMA agrees with the statement in the Notice of Inquiry that it is important for the Commission to reevaluate the application of the public interest standard to commercial programming in the new environment created by the rapid expansion in the number of video information sources available to viewers. Upon completion of that review, NIMA believes the Commission should conclude that there is no showing of any need to revise its Commercialization policy. No reason has been shown why the Commission should jettison its carefully considered, and judicially approved, approach in favor of selective, sectoral regulation based on the content of the licensee's speech. See Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1426-31 (D.C. Cir. 1983); Action for Children's Television v. FCC, 821 F.2d 741, 748-49 (D.C. Cir. 1987).

In particular, there is no justification for reimposition of time limits on commercial programming, under the public interest rationale, to restrict the showing of program-length commercials by broadcast stations. These programs contribute hundreds of millions of dollars in annual revenues that help support free, over-the-air broadcasting. Further, the Commission's prior experience with such limits demonstrated that they were difficult to

monitor and enforce, even in an era when commercials consisted entirely of 30 and 60 second spots. But with the evolution of commercial programming in the last decade and the rapid pace of innovation in this area, reimposition of such limits would be nearly impossible as an operational matter.

Finally, at a time when video sources are proliferating rapidly, there are insuperable constitutional objections to adoption of categorical time limits on the showing of program-length commercials. Any concerns with the alleged failure of a broadcast station to meet its public interest obligations can, and should, be resolved on a station-by-station basis at renewal time. Accordingly, because there are other regulatory strategies besides a content-based time limit that would effectively address cases where a licensee broadcast commercial programming so extensively as to ignore its public interest obligations, imposition of preclusive limits on program-length commercials would violate the First Amendment. City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993).

I. NO JUSTIFICATION HAS BEEN SHOWN FOR REIMPOSITION OF TIME LIMITS ON THE AMOUNT OF COMMERCIAL MATTER BROADCAST BY TELEVISION STATIONS

The Commission's Commercialization decision was premised on the impending expansion in the number of video information sources available to viewers. The Commission

believed that in this new, highly competitive environment, market forces -- that is, viewer preferences -- would determine the appropriate level of commercial programming and would effectively regulate commercial excesses. The Commission also predicted that individuals would respond to their new freedom by innovating in commercial programming. Based on these predictions, the Commission concluded that, consistent with the public interest, it could eliminate its policy limiting the amount of commercial programming television stations could broadcast per hour. Both these predictions have proved true. The availability of video information sources has increased exponentially since 1984, and will do so again as a new generation of technology comes on line.

Although not predicted at the time, the infomercial is a prime example of the innovation in commercial programming unleashed by the 1984 decision. Since then, the program-length commercial has become a broadly accepted feature of broadcast television, both on large stations and small, at all times of day, and for all kinds of products, including those offered by the country's largest retailers. As a result, infomercials generate substantial revenues for broadcast stations. Further, the field has been marked by substantial innovation and continues to evolve, to better serve viewer interests and needs. The existence of this industry was made possible by the Television Deregulation

decision. Reimposition of time limits on commercial programming would adversely affect this irreplaceable income stream for broadcasters, stifle further innovation, and frustrate the manifest viewer demand for these programs.

These factors demonstrate that the Commission was correct in 1984, when it determined that elimination of the Commercialization guidelines would "promote licensee experimentation and otherwise increase commercial flexibility." Television Deregulation, 98 F.C.C.2d at 1105. Since that time, the program-length commercial has developed to satisfy a previously unanticipated consumer desire for longer commercial segments that provide in-depth knowledge about specific products and issues.

No showing has been made why the Commission's current policies are not appropriate for today's broadcast environment, or why the Commission should now revert to a discredited command-and-control regulatory philosophy that is inappropriate for an era of proliferating choices in video information programming. The length of a commercial should not properly be part of the Commission's public interest calculus.

There are strong policy reasons why the Commission should not seek to reimpose quantitative limits on broadcasts of commercial matter. Program-length commercials will be available, in any event, to viewers on cable systems. Significant economic dislocations would occur if

the Commission diverted such paid programming from broadcast stations to cable channels. There is no sound policy reason why the Federal government should seek to encourage such a shift, especially in the emerging 500-channel environment. To the contrary, the Commission should support the maintenance and availability of free television to the viewing public.

II. REIMPOSITION OF TIME LIMITS ON BROADCAST OF COMMERCIAL PROGRAMS WOULD VIOLATE THE FIRST AMENDMENT

With the decline of spectrum scarcity as a justification for discriminating against commercial speech,[2] any effort to reimpose categorical time limits on the broadcast of commercial programming would create substantial First Amendment problems. Other effective regulatory approaches besides time limits are available to address concerns with broadcasters who carry commercial programming to the detriment of their public interest obligations. Accordingly, proponents of time limits cannot carry their burden of proving that a content-based discrimination against commercial speech would be "narrowly tailored" to the government interest allegedly implicated. On constitutional grounds, the Commission therefore should

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[2]In City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 495 (1986), the Supreme Court clearly noted that the only justification for regulation of speech by broadcasters was "the scarcity of available frequencies", a concern that has diminished substantially since that time.

reject all suggestions that it reimpose a "category-based, quantitative approach to evaluating a licensee's programming performance" of the kind the Commission rejected in 1984. Television Deregulation, 98 F.C.C.2d at 1079.

Since 1984, several Supreme Court decisions have clarified that commercial speech is entitled to a substantial degree of protection under the First Amendment. E.g., Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989); City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993). Commercial speech "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources . . . ." Discovery Network, 113 S. Ct. at 1512 n. 17. There can be little doubt that an infomercial, proposing a commercial transaction between the sponsor and the viewer, and conveying substantial information to the viewer about the proposed transaction, qualifies as "core" commercial speech. Whatever rationale may exist for drawing regulatory distinctions between commercial and non-commercial speech, it does not justify a content-based rule that limits the amount of commercial speech that may occur.[3]

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[3]The principal interest that may justify greater government regulation of commercial speech than noncommercial speech is prevention of "commercial harms", such as fraud or deception. City of Cincinnati, 113 S. Ct. at 1515 & n. 21. That rationale is not implicated here, for imposition of a quantitative limit on the amount of commercial matter that may be broadcast would not address

Further, Supreme Court decisions also establish that any content-based discrimination against commercial speech must, at a minimum, be "narrowly tailored" to serve a significant government interest. In addition, the government must bear the affirmative burden of justifying any such restriction. E.g., Fox, supra, 492 U.S. at 480; Discovery Network, supra, 113 S. Ct. at 1510 n. 12. In order to be sustained, a regulation need not be the least severe that will reach a goal. But "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." Discovery Network, 113 S. Ct. at 1510 n. 13.

In this area, the Commission has long had in place a regulatory scheme that is less intrusive and adequately addresses public interest concerns involving broadcast stations -- its license renewal process. This approach permits questions about excessive commercial programming to be addressed on a case-by-case basis, as it should be. Thus, the existence of this process would, as a constitutional matter, defeat any effort to show that a

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"commercial harms" in any respect. Furthermore, the Commission has recognized in Congressional testimony that enforcement of rules regarding deceptive advertising belongs with the Federal Trade Commission. See, e.g., Testimony of William H. Johnson, Deputy Chief, Mass Media Bureau in Infomercials, Hearing of the House Committee on Small Business, 101st Cong., 1st Sess. 36-37, 106 (May 2, 1989).

quantitative time limit is "narrowly tailored" to address public interest concerns with excess commercialization.

For many years, prior to its Television Deregulation decision, the Commission has maintained a policy that broadcasters must carry programs responsive to the needs and issues of importance to the local community of license. National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978). This obligation has always been enforced primarily through an individualized review, at the time of license renewal, of the licensee's responsiveness to local programming needs. If the aggregate amount of commercial programming (or any other form of programming) diminishes a station's responsiveness to the needs and interests of its local community, that fact can be addressed in reviewing the renewal application or in a competitive challenge. See Monroe Communications Corp. v. FCC, 900 F.2d 351 (D.C. Cir. 1990). But basing licensing decisions on the content of the speech carried by a station would raise significant First Amendment concerns and could violate the anti-censorship requirements of Section 326 of the Act. National Black Media Coalition, 589 F.2d at 580-81.

The 1984 decision modified one relevant aspect of prior Commission policy. The Commission eliminated specific quantitative limits, based on its conclusion that the amount of commercial programming carried by a station would not, in and of itself, preclude a finding that the licensee was

acting in the public interest. But the Commission explicitly maintained the requirement that the licensee must "provide programming responsive to issues of concern to its community of license." Television Deregulation, 98 F.C.C.2d at 1091. That obligation remains fully enforceable through the license renewal process.

In sum, if there is a concern that a particular station is carrying so much advertising that it no longer fulfills its local community programming obligation, then that question can and should be fully addressed in the context of its individual license renewal proceeding. The existence of this effective alternative regulatory approach therefore establishes that a rule reimposing a quantitative limit on commercial programming by all broadcasters would burden substantially more speech than is necessary to further the government's narrow interest. Accordingly, it would be unconstitutional in the current environment of numerous sources of video information.

CONCLUSION

For these reasons, the Commission should, upon due consideration, determine not to initiate a rulemaking to consider reimposition of quantitative time limits on commercial programming carried by television broadcast stations.

Respectfully submitted,

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